Leo Leslie Armstrong (as the President and Committee of The Young Men's Christian Association of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (previously held by Majlis Mesyuarat Kerajaan Negeri Selangor)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(A)-114–03 OF 2013
ALIZATUL KHAIR, MOHTARUDIN BAKI AND ABDUL AZIZ AB RAHIM JJCA
14 MAY 2014

Land Law — Subdivision — Imposition of condition — Land authority approved application to subdivide freehold land into two lots on condition tenures of both lots changed to leasehold — Whether land authority's decision ultra vires National Land Code and null and void — Whether fact land owner consented to conversion of land tenure irrelevant to application to declare action by land authority void — Whether delay and statutory time bars ineffectual to oppose application — Whether laches and acquiescence inapplicable to deny law owner relief — Whether dominant issue in land owner's action concerned private rights relating to own land, hence application by way of judicial review to challenge public authority's decision not a must — Whether Federal Court's decision relevant to fact in issue in present case decided 13 years after cause of action in present case arose should have been applied retrospectively to resolve dispute

The appellant owned a piece of freehold land in Brickfields, Kuala Lumpur, registered under the name of 'The President and Committee for the time being of The Young Men's Christian Association of Kuala Lumpur'. In 1966, the appellant applied for the land to be subdivided into two lots – one, to be retained for its own use ('Lot A') and the other ('Lot B') to be leased out to a petroleum company to run a petrol filling and service station. The appellant's application was approved subject, inter alia, to the condition that the tenure of land holding of Lot B would be converted to a 30-year lease. Lot A's tenure was also changed, but to a 99-year lease. The appellant agreed to the change in land tenure and the documents of qualified title in respect of the two lots were issued to the appellant in August 1967. In 1974, the respondent took over the functions of the authority that had approved the subdivision. About 45 years after the subdivision was done, the appellant filed an originating summons ('the OS') in the High Court to (i) declare that the conversion of the freehold tenure of the two lots to leasehold was ultra vires the National Land Code ('the NLC') and null and void (ii) declare that the status of the two lots be reverted to freehold tenure. The appellant's reason for the protracted delay in making

the application was that its previous committee members were unaware that the change in tenure of the two lots from freehold to leasehold was ultra vires the NLC. In any event, the appellant contended that delay or statutory time bars were irrelevant when the challenge was against an ultra vires transaction. The respondent opposed the appellant's application contending it was time barred under s 418 of the NLC, s 2(a) of the Public Authorities Protection Act 1948 and s 9 of the Limitation Act 1953; that since the appellant's action was against the decision of a public authority, it should have applied by way of judicial review under O 53 of the Rules of the High Court 1980 under which it was also time barred; and that the appellant was guilty of laches after having acquiesced to the change in the land tenure since 1966/1967 and therefore should be denied of any relief. The High Court decided in favour of the respondent holding that the appellant's application was not only statute barred but was unconscionable as the appellant 'had reaped the benefits of being able to lease Lot B for income for the last 30 years'. The High Court also ruled that the Federal Court's decision in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (*Sri Lembah*) – relied upon by the appellant for the principle that a land executive committee had no power to make an applicant give up its freehold title in exchange for a 99-year lease – did not apply to the instant case as the decision did not have retrospective effect. In *Sri Lempah*, the Federal Court unanimously held that the state authority would be acting outside its powers if it imposed a condition that an approval for conversion under s 124 of the NLC was conditional upon the applicant surrendering its title in perpetuity in exchange for a lease of 99 years; that the land executive committee did not have unfettered discretion to impose such conditions or requirements thought fit by the committee and that it had to act reasonably and could only impose conditions relevant to the permitted development. The instant appeal was against the High Court's decision.

Held:

(1) The court was not in a position to order the respondent to reinstate the land tenure to freehold as this was a matter within the respondent's discretion. The appellant could apply to the respondent for rectification of the land titles with regard to the tenure of land holding and the respondent was to have regard to the decision of this court in this case when considering such application (see para 55).

(2) The respondent or its predecessor had no authority or legal power to reduce the tenure of the appellant's land holding from perpetuity to leasehold. By making that change in land tenure as a condition for approval of the appellant's application for subdivision, the respondent or its predecessor had acted ultra vires the NLC and the act was null and void. The proposition that limitation did not apply to any act done outside a body's legal power or authority was well entrenched. Limitation also did not apply to a suit, action or proceeding for declaratory orders

which was what the appellant was seeking. For those same reasons, the court was of the view that it was not fatal that the appellant did not resort to s 418 of the NLC to challenge the decision of the land administrator (see paras 40–41 & 44–46).

(3) The relevant provision in the NLC which applied at the material time, in 1966, was s 204(4) which stated that land re-alienated upon surrender shall continue to be subject to the same category of land use, express conditions and restrictions in interest and implied conditions attached to the land immediately prior to the surrender. Nothing in s 204(4) allowed the land administrator to change any of those aforesaid matters. The power to change existing express conditions, category of land use or restrictions in interest endorsed on a document of title or to impose new conditions was governed by s 124 of the NLC. Even then, it could only be done on application by the registered owner of the land (see para 21).

(4) Except for the 'so-called' consent by the appellant to the change of tenure from freehold to leasehold, the material facts in *Sri Lempah* were on all fours with the facts in the instant appeal. As nothing in *Sri Lempah* stated that the Federal Court's decision was applicable only prospectively and did not have retrospective effect, the High Court in the instant case should have applied the principle in *Sri Lempah* and held that the decision of the respondent's predecessor to replace the perpetuity holding with a leasehold holding was ultra vires and unlawful. The issue that the appellant had consented or acquiesced to the change in land tenure was irrelevant (see paras 28 & 33–34).

(5) Laches and acquiescence did not apply to the present case. The appellant was not seeking an equitable remedy. The court did not accept the argument that because the decision of the respondent's predecessor was communicated to the appellant in 1966, the latter ought to have full knowledge of the decision and its legal implication. Having knowledge of a decision and having understood its legal implication particularly as to the validity or legality of a decision were two different things. In its affidavit, the appellant had affirmed that its past committee members had no knowledge that the act of the respondent's predecessor was ultra vires the NLC. The court also noted that the appellant's application did not affect any third party interest and neither did the respondent show how it was prejudiced by the application (see para 53).

(6) The High Court's view that the appellant's application was unconscionable since it had reaped the benefits of being able to lease Lot B for income for the last 30 years as a result of the land administrator's decision, was incorrect. Such argument was grounded on rules of equity, but equity did not apply where the decision purportedly giving rise to the equity was unlawful (see para 47).

(7) The appellant had the option to either make its application under O 53 of the Rules of Court or by way of originating summons. Although the decision that was challenged was made by a public authority, the rights affected by the decision to convert the freehold land tenure to leasehold were the appellant's private rights, namely the right to ownership and enjoyment of the land. Therefore, the dominant issue in this case was the issue of private rights (see para 43).

[Bahasa Malaysia summary

Perayu memiliki sebidang tanah bebas pegangan di Brickfields, Kuala Lumpur, yang berdaftar di bawah nama 'The President and Committee for the time being of The Young Men's Christian Association of Kuala Lumpur'. Pada tahun 1996, perayu telah memohon untuk tanah itu dibahagikan kepada dua lot – satu, untuk dikekalkan bagi kegunaannya sendiri ('Lot A') dan satu lagi ('Lot B') untuk dipajakkan kepada syarikat petroleum bagi menjalankan stesen pengisian petrol dan perkhidmatan. Permohonan perayu telah diluluskan tertakluk, antara lain, kepada syarat bahawa tempoh pemegangan tanah Lot B akan ditukarkan kepada pajakan 30 tahun. Tempoh pemegangan Lot A juga ditukar, tetapi kepada pajakan 99 tahun. Perayu bersetuju untuk menukar pemegangan tanah itu dan dokumen-dokumen hakmilik sementara berkaitan dua lot tersebut telah dikeluarkan kepada perayu pada Ogos 1967. Pada 1974, responden mengambil alih fungsi pihak berkuasa yang telah meluluskan pembahagian itu. Lebih kurang 45 tahun selepas pembahagian itu dilakukan, perayu telah memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk: (i) mengisytiharkan bahawa penukaran tempoh pegangan bebas dua lot kepada pegangan pajakan adalah ultra vires Kanun Tanah Negara ('KTN') dan terbatal dan tidak sah; (ii) mengisytiharkan bahawa status dua lot itu dikembalikan kepada tempoh pegangan bebas. Sebab kelewatan perayu yang berlarutan dalam membuat permohonan adalah kerana bekas ahli-ahli jawatankuasanya tidak menyedari bahawa penukaran dalam pemegangan dua lot itu daripada pegangan bebas kepada pegangan pajakan adalah ultra vires KTN. Dalam apa-apa keadaan, perayu berhujah bahawa kelewatan atau had masa statutori adalah tidak relevan apabila cabarannya adalah terhadap transaksi ultra vires. Responden membantah permohonan perayu dengan berhujah bahawa ia telah luput had masa di bawah s 418 KTN, s 2(1) Akta Perlindungan Pihak-Pihak Berkuasa Awam 1948 dan s 9 Akta Had Masa 1953; oleh kerana tindakan perayu adalah terhadap keputusan pihak berkuasa awam, ia patut telah memohon melalui semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 di mana ia juga dihadkan oleh masa; dan bahawa perayu adalah bersalah kerana kelengahan setelah akur kepada perubahan dalam pemegangan tanah itu sejak 1966/1967 dan oleh itu patut dinafikan apa-apa relief. Mahkamah Tinggi telah menyebelahi responden dengan memutuskan bahawa permohonan perayu bukan sahaja dihalang statut tetapi adalah tidak berpatutan kerana perayu 'had reaped the benefits of being able to lease Lot B for income for the last 30 years'. Mahkamah Tinggi juga

memutuskan bahawa keputusan Mahkamah Persekutuan dalam kes *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (*Sri Lembah*) – yang digunakan oleh perayu untuk prinsip bahawa jawatankuasa eksekutif tanah tidak mempunyai kuasa untuk membuat pemohon melepaskan hakmilik pegangan bebasnya untuk penukaran pajakan 99 tahun – tidak terpakai kepada kes ini kerana keputusan itu tidak mempunyai kesan kebelakangan. Dalam kes *Sri Lempah*, Mahkamah Persekutuan sebulat suara memutuskan bahawa pihak berkuasa negeri akan bertindak di luar kuasanya jika ia mengenakan syarat bahawa kelulusan untuk penukaran di bawah s 124 KTN adalah bersyarat selepas pemohon menyerahkan hakmiliknya selama-lamanya dalam penukaran untuk pajakan 99 tahun; bahawa jawatankuasa eksekutif tanah tidak mempunyai budi bicara yang tidak terbatas untuk mengenakan syarat atau keperluan sedemikian yang difikirkan sesuai oleh jawatankuasa dan bahawa ia perlu bertindak dengan wajar dan hanya boleh mengenakan syarat relevan dengan perkembangan yang dibenarkan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan:

(1) Mahkamah bukan dalam kedudukan untuk memerintahkan responden mengembalikan semula tempoh pemegangan tanah untuk pegangan bebas kerana ini adalah perkara dalam budi bicara responden. Perayu boleh memohon kepada responden untuk pembetulan hakmilik tanah berkaitan tempoh pemegangan tanah itu dan responden perlu mengambil kira keputusan mahkamah dalam kes ini apabila mempertimbangkan permohonan sedemikian (lihat perenggan 55).

(2) Responden atau orang sebelumnya tidak mempunyai autoriti atau kuasa sah untuk mengurangkan tempoh pemegangan tanah perayu daripada selama-lamanya kepada pegangan pajakan. Dengan membuat penukaran dalam tempoh tanah itu sebagai satu syarat kelulusan untuk permohonan pembahagian perayu, responden atau orang sebelumnya telah bertindak ultra vires KTN dan tindakan itu adalah terbatal dan tidak sah. Cadangan bahawa had masa tidak terpakai kepada apa-apa tindakan yang dilakukan di luar kuasa atau autoriti sah suatu badan telah lama termaktub. Ha masa juga tidak terpakai kepada suatu guaman, tindakan atau prosiding untuk perintah deklarasi yang mana dipohon oleh perayu. Bagi sebab yang sama, mahkamah berpendapat bahawa ia tidak memudaratkan jika perayu tidak menggunakan s 418 KTN untuk mencabar keputusan pentadbir tanah (lihat perenggan 40–41 & 44–46).

(3) Peruntukan relevan dalam KTN yang terpakai pasa masa matan, pada 1996, adalah s 204(4) yang menyatakan bahawa tanah yang diberi milik semula selepas penyerahan hendaklah berterusan tertakluk kepada kategori sama penggunaan tanah, syarat nyata dan sekatan dalam kepentingan dan syarat tersirat yang beserta tanah tersebut sejurus

sebelum penyerahan itu. Tiada apa-apa dalam s 204(4) membenarkan pentadbir tanah menukar mana-mana perkara tersebut. Kuasa untuk menukar syarat nyata yang sedia ada, kategori penggunaan tanah atau sekatan dalam kepentingan yang diindorskan atas surat ikatan hakmilik atau untuk mengenakan syarat baru adalah dikawal oleh s 124 KTN. Namun begitu, ia hanya boleh dilakukan atas permohonan pemilik berdaftar tanah tersebut (lihat perenggan 21).

(4) Kecuali persetujuan 'so-called' oleh perayu untuk menukar tempoh pemegangan daripada pegangan bebas kepada pegangan pajakan, fakta penting dalam kes *Sri Lempah* adalah sama dengan fakta dalam rayuan ini. Tiada apa-apa dalam kes *Sri Lempah* yang menyatakan bahawa keputusan Mahkamah Persekutuan hanya terpakai secara prospektif dan tidak mempunyai kesan kebelakangan, Mahkamah Tinggi dalam kes ini sepatutnya memakai prinsip dalam kes *Sri Lempah* dan memutuskan bahawa keputusan orang sebelum responden untuk menukar pegangan selama-lamanya dengan pemegangan pajakan adalah ultra vires dan menyalahi undang-undang. Isu yang perayu telah bersetuju atau akur dengan penukaran tempoh pemegangan tanah itu adalah tidak relevan (lihat perenggan 28 & 33–34).

(5) Kelengahan dan persetujuan tidak terpakai dalam kes ini. Perayu tidak memohon remedi ekuiti. Mahkamah tidak menerima hujah bahawa kerana keputusan orang sebelum responden telah disampaikan kepada perayu pada 1996, perayu sepatutnya mempunyai pengetahuan tentang keputusan itu dan implikasi undang-undangnya. Dengan mempunyai pengetahuan tentang suatu keputusan dan memahami implikasi undang-undang khususnya berhubung kesahihan atau kesahan suatu keputusan adalah dua perkara berbeza. Dalam afidavitnya, perayu telah mengesahkan bahawa bekas ahli-ahli jawatankuasanya tidak mempunyai pengetahuan yang tindakan orang sebelum responden adalah ultra vires KTN. Mahkamah juga mengambil perhatian bahawa permohonan perayu tidak menjejaskan mana-mana kepentingan pihak ketiga dan responden juga tidak menunjukkan bagaimana ia terjejas dengan permohonan itu (lihat perenggan 53).

(6) Pandangan Mahkamah Tinggi bahawa permohonan perayu adalah tidak berpatutan sebab ia telah memperolehi manfaat kerana dapat memajak Lot B untuk pendapatan sejak 30 tahun yang lalu akibat keputusan pentadbir tanah, adalah tidak betul. Hujah sebegitu adalah berasaskan kaedah-kaedah ekuiti, tetapi ekuiti tidak terpakai jika keputusan yang bermaksud untuk mewujudkan ekuiti itu adalah menyalahi undang-undang (lihat perenggan 47).

(7) Perayu mempunyai pilihan sama ada untuk membuat permohonannya di bawah A 53 Kaedah-Kaedah Mahkamah atau melalui sama pemula. Walaupun keputusan yang dicabar telah dibuat oleh pihak berkuasa

awam, hak-hak yang terjejas oleh keputusan untuk menukar tempoh pemegangan tanah pegangan bebas kepada pegangan pajakan adalah hak peribadi perayu, terutamanya hak kepada milikan dan menikmati tanah itu. Oleh itu, isu utama dalam kes ini adalah isu berhubung hak peribadi (lihat perenggan 43).]

Notes

For cases on imposition of condition, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5324–5325.

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298; [2002] 3 CLJ 521, CA (refd)
Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor [2011] 5 MLJ 309, FC (refd)
Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)
Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)
Appanna v Jami Venkatappadu & Ors AIR 1953 Madras 611, HC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Bradford Corpn v Myers [1916] 1 AC 242, HL (refd)
Director of Forest, Sarawak & Anor v Balare Jabu & Ors and another appeal [2012] 7 CLJ 685, FC (refd)
EU Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175, FC (refd)
Hubah Sdn Bhd & Ors v Koperasi Pusaka (Penampang) Berhad & Ors [2011] MLJU 230; [2011] 1 LNS 274, HC (refd)
Hubah Sdn Bhd & Ors v Koperasi Pusaka (Penampang) Bhd [2013] 5 MLJ 761, CA (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Land Executive Committee of Federal Territory v Syarikat Harper Gilfillian Berhad [1981] 1 MLJ 234, FC (refd)
Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794, CA (refd)
M Ratnavale v S Lourdenadin M Mahadevan v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Mallisamy a/l Periasamy & Anor v Pentadbir Tanah Melaka Tengah & Anor [1998] 5 MLJ 495, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25, SC (refd)
Ngo Ong Chung & Ors v Pengarah Tanah dan Galian Perak Darul Ridzuan [2013] 10 MLJ 879; [2013] 1 LNS 146, HC (refd)

O'Reilly v Mackman [1982] 3 All ER 1124, HL (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (distd)
Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department & Anor [1996] 5 MLJ 366, HC (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182, FC (refd)

Legislation referred to

Co-Operative Society Act 1993
Dangerous Drugs Act 1952 s 37(d), (da)
Land Acquisition Act 1960
Limitation Act 1953 ss 9, 29, 32
National Land Code ss 124, 124(1), (1)(b), (2), (4), 203, 204, 204(4), 204E(3), 418
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of Court 2012 O 53
Rules of the High Court 1980 O 53 r 3(6)

Appeal from: Originating Summons No 24NCVC-3214 of 2011 (High Court, Kuala Lumpur)

Su Tiang Joo (Nasema Jalaludheen and Faye Lim with him) (Cheah Teh & Su) for the appellant.
Maisarah bt Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abdul Aziz Ab Rahim JCA:

[1] The appellant was the registered owner of a piece of land held under Grant 4541, Lot 152, Section 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan ('Lot 152'). The area of Lot 152 was 4 acres 3 rods and 38 poles. In 1996, Lot 152 was held under the name of 'The President and Committee for the time being of The Young Men's Christian Association of Kuala Lumpur'. The tenure of Lot 152 was freehold.

[2] Sometime in 1966, the appellant submitted an application to the Collector of Land Revenue Kuala Lumpur, Selangor for subdivision of Lot 152 into two lots. The purpose of the subdivision was to enable the appellant to use one of the lots as a site for petrol station and to lease it to ExxonMobil Malaysia as a source of income for the appellant.

[3] On 1 July 1966, the Collector of Land Revenue Kuala Lumpur informed the appellant that the Majlis Mesyuarat Kerajaan Negeri Selangor had approved its application for subdivision by letter of the same date. The subdivision was approved subject to terms and conditions stated in the approval letter. One of the conditions is that the tenure of land holding would be changed to 30 years lease instead of freehold land as the original land tenure before the subdivision. For full appreciation of the terms and conditions of the subdivision, the full contents of the letter by the collector of land revenue dated 1 July 1966 to the appellant is reproduced below:

Pejabat Tanah,
Kuala Lumpur,

1st July, 1966

General Secretary,
Y.M.C.A.
Jalan Brickfields,
Kuala Lumpur.

Tuan,

Grant 4541, Lot 152, Section 55 Bandar Kuala Lumpur

Saya merojok surat tuan bertarikh 28hb April, 1966 berkenaan dengan permohonan tuan memechah dua Lot 152 dan menggunakan sebahagian tanah itu untok mendirikan 'Petrol Station' dan yang sebahagian lagi untok bangunan perkasa, dan menyatakan bahawa Majlis Mesyuarat Kerajaan telah meluluskan permohonan tuan seperti berikut:-

(I) Upon subdivision of lot 152 and upon surrender of the title in respect of the lot to be used for a petrol filling station, re-alienation of the lot on the following terms and conditions:-

Title: Registry title: Lease for 30 years

Premium: $14,880/-

Annual rent: 1% of $247,995/-

Survey & (ineligible) fees: Prescribed rates.

Category of Land use: Building

Express Conditions:

(i) The land hereby leased shall be solely used for the purpose of a petrol filling and servicing station and shall not be used for any other purpose.

(ii) The lessee shall pay and discharge all taxes, rates, assessments and charges whatsoever, which may be payable for the time being in respect of the land hereby leased or any building thereon or any part thereof whether levied by a Municipality or any other authority.

(II) The express condition (iii) attached to the title in respect of the remaining area shall be rescinded under section 124(i)(b) of the National Land Code on the following terms and Condition

Further premium	$1,000/-
New rent	1% of 50[a2] per square foot
Express Condition	Continuation of conditions (i) and (ii).

2. Sila hantar ka-pejabat ini sakeping chek berharga $15,880/- untok bayaran premium.

3. Bayaran ini hendak-lah di-jelaskan dalam tempoh 6 bulan dari tarikh surat ini. Jika dalam masa yang tersebut premium tidak di-bayar kelulusan ini akan di-batalkan.

Saya dengan hormat-nya

sgd

(Nasruddin bin Bahari)

[4] By letter dated 9 August 1966 addressed to *Pemungut Hasil Tanah* Kuala Lumpur, the appellant informed the *pemungut hasil tanah* that the trustees of the appellant had met with regard to the *pemungut hasil tanah*'s approval letter dated 1 July 1966 approving the subdivision and informed the *pemungut hasil tanah* that they have agreed to the terms laid down in the letter by the *pemungut hasil tanah* approving the subdivision. In other words, it implies that the appellant accepted the change of the tenure of the land holding from freehold to leasehold upon the approval of the subdivision.

[5] Consequent to the subdivision approval, Lot 152 was divided into two lots. The first and the bigger lot (which is meant for use by the appellant) is now known as Lot 524 held under PN 33501 Section 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan ('Lot A') and the tenure is 99 years. The second and smaller lot (which was eventually leased to ExxonMobil Malaysia Sdn Bhd for use as petrol station) is known as PT 27 held under HS(D) 100586 Section 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan ('Lot B') and the tenure is 30 years.

[6] In 1974, there was a restructuring of the posts in the administration of land in Wilayah Persekutuan arising from the separation of Kuala Lumpur from the State of Selangor. The *jawatankuasa* held by the Majlis Mesyuarat Kerajaan Negeri Selangor was taken over by the respondent.

[7] On 19 December 2011, about 45 years after the respondent's predecessor approved the subdivision and upon which approval the land tenure was changed from freehold to leasehold, the appellant filed an originating summons against the respondent seeking the following declarations:

1. Satu perisytiharan bahawa pemecahan lot oleh Defendan pada tahun 1966 atas tanah pegangan kekal Plaintif yang dipegang di bawah Geran No. 4541 Lot 152, Seksyen 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur Selangor itu kepada dua (2) lot iaitu tanah pertama, yang dipegang di bawah PN 33501, Lot 524, Seksyen 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan dengan pegangan pajakan 99 tahun dan tanah kedua yang dipegang di bawah H.S.(D) 100586, P.J. 27, Seksyen 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan dengan pegangan pajakan 30 tahun masing-masing itu adalah ultra vires and tidak sah.

2. Satu perisytiharan lanjutan bahawa kedudukan pegangan pajakan kedua-dua keping tanah di bawah PN 33501, Lot 524, Seksyen 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur dan H.S.(D) 100586, P.T. 27, Seksyen 55, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur itu dipilih kepada kedudukan pegangan kekal sebagaimana yang wujud sebelum pemecahan lot.

The principal ground for the application by the appellant is that the change of the status of the original land tenure from freehold to leasehold for the subdivided Lots A and B is ultra vires and unlawful.

[8] The respondent opposed the application. In the respondent's affidavit in reply, affirmed by one, Datuk Ahmad Feisal bin Talib, *timbalan pengerusi* of the respondent, on 9 February 2012 it was averred that after the registration of the new title (after the approval of the subdivision) until the filing of the originating summons, the appellant did not raise any objection as to the change of the original title from freehold to leasehold of 99 years and 30 years for the respective two lots. And therefore it was further averred that the appellant's application for the declaration was time barred.

[9] Responding to this averment, the appellant in its affidavit in reply affirmed by one Ong Tatt Poh on 23 February 2012 averred in para 7 of the affidavit in reply that members of the appellant's committee were not aware that the change of the tenure of Lots A and B from freehold to leasehold of 99 years and 30 years respectively was ultra vires. This is the reason, the appellant says, that contribute to the delay in making the application. Paragraph 7 of the appellant's affidavit in reply affirmed on 23 February 2012 in its original *Bahasa Malaysia* read as follows:

Saya merujuk kepada perenggan 6(vii) dan (viii) dalam Affidavit Defendan. Saya

dinasihatkan dan sesungguhnya mempercayai bahawa had masa itu tidak terpakai dalam kes yang melibatkan transaksi yang ultra vires. Ahli-ahli jawatankuasa Persatuan yang lalu tidak sedar tentang tindakan ultra vires itu. Sebagai seorang peguamcara serta Presiden Persatuan yang baru dilantik, barulah saya mengetahui bahawa pertukaran jenis tanah daripada kekal kepada pajakan selama 30 tahun bagi Lot B dan selama 99 tahun untuk Lot A adalah ultra vires and tidak adil. Inilah sebab kelewatan permohonan ini.

[10] In para 8 of its affidavit in support the appellant also relied on the Federal Court's decision in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, which decided that a land executive committee had no power to make the applicant give up its freehold title and receive in exchange a 99 year lease. However, the respondent in its affidavit in reply and in the submission of senior federal counsel had argued that the Federal Court's decision in *Sri Lempah* has no application because at the time when the appellant made the application for subdivision and at the time when the approval for subdivision was given, *Sri Lempah* was not the law and the decision of *Sri Lempah* given in 1979 does not have retrospective effect to render the decision of the land administrator in this appeal which was given in 1966 unlawful or ultra vires.

[11] The appellant in its affidavit also referred to the proviso of s 204E(3) of the National Land Code ('the NLC') which reads as follows:

Provided that where the original title is a title in perpetuity, the period for which the land is to be re-alienated shall also be in perpetuity, and where the original title is for a period of years, the period for which the land is to be re-alienated shall not be less than the remaining of the period of the lease for which the land was held under the original title.

[12] However, in his oral submission before us, learned counsel for the appellant informed us that the appellant is not relying on s 204E(3) of the NLC. We do, however take note that the proviso to s 204E(3) is the embodiment of the principle laid down in *Sri Lempah*.

[13] The learned senior federal counsel for the respondent also argued that this appeal ought to be dismissed because the appellant's application for declaration is time barred under s 418 of the NLC, s 2 of the Public Authorities Protection Act 1948 ('the PAPA 1948') as well as s 9 of the Limitation Act 1953. The learned senior federal counsel also submitted that the appellant ought to have applied by way of judicial review under O 53 of the Rules of Court 2012 (at the material time, the applicable rule is O 53 of the Rules of the High Court 1980 which was in pari materia with the present O 53 of the Rules of Court 2012). Under this rule the appellant must make the application within 40 days of the decision or from the date the decision was first

communicated to the appellant. In this case, the learned senior federal counsel submitted that the appellant was informed of the change of conditions in the land holding by letter dated 1 July 1966 which was referred above; and the document of qualified title for Lots A and B was issued to the appellant on 4 August 1967. Therefore, it was argued that, taking these dates as the dates when the appellant came to know about the change in the status of the land holding from freehold to leasehold, the appellant is, by all accounts, out of time in making the application. For this reason also, the learned senior federal counsel argued that s 29 of the Limitation Act 1953 does not apply because there was no mistake on the appellant's part as the appellant had knowledge of the change in the status of the land tenure since 1967. It was argued that the reason given by the appellant in para 7 of its affidavit in reply that the appellant was not aware that at the material time the land executive committee has no power to impose the condition of change of land tenure from freehold to leasehold does not amount to a mistake.

[14] The learned senior federal counsel also distinguished the factual matrix in *Sri Lempah* from the facts in the present case. She pointed out to us that in *Sri Lempah* the appellant never consented to the change in the land tenure from freehold to leasehold. Also, in *Sri Lempah*, the application to challenge the decision of the land executive committee was made within time.

[15] Therefore, the senior federal counsel submitted that the decision of the land executive committee in this appeal is not ultra vires or unlawful.

FINDINGS OF THE HIGH COURT

[16] The High Court in its decision given on 31 January 2013, agreed with the respondent's submission that the Federal Court's decision in *Sri Lempah* did not have any retrospective effect and therefore cannot be applied to the present case to declare the decision by the land executive committee in the present appeal as ultra vires.

[17] On the issue of limitation, the High Court also agreed with the respondent's submission that the appellant's action was statute barred. On this issue, the High Court noted that the plaintiff's action was filed in the High Court on 19 December 2011. The judgment by the High Court on this point is found at para 40 of the written judgment and reads as follows:

> Going on the issue of limitation, the court finds that the plaintiff's action is clearly statute barred. The acts complained of by the plaintiff occurred in 1966. By the time that the present action is filed in 2012, more than 45 years later, the leasehold title of 30 years in respect of Lot 2 would already have expired. The plaintiff would have

already reaped the benefits of being able to lease Lot 2 to ExxonMobile for income for the last 30 years. The court finds its action in commencing this action to be both statute barred as well as unconscionable.

OUR FINDINGS AND DECISION

[18] There are two issues that require our consideration. The first issue is whether the decision by the land administrator made in 1966 is ultra vires and unlawful on the ground that the land administrator had no power to make such decision ie to impose as a condition of approval for the subdivision that the land tenure be changed from freehold to leasehold and was therefore in breach of his statutory duty. The second issue is, if the decision of the land administrator then is ultra vires, whether the appellant's action is statute barred.

[19] As we have seen above, the High Court was of the view that the decision is intra vires and the appellant's action is statute barred. In our opinion, the learned High Court judge erred in her view. Our reasons are as follows.

[20] The starting point to consider whether the decision by the land administrator to change the tenure of subdivided Lots A and B from freehold to leasehold is ultra vires and unlawful or otherwise is s 204E(3) of the NLC which reads as follows:

> (3) If the State Authority decides to approve the application, whether as originally submitted or as amended pursuant to sub-section (2), the State Authority shall proceed to determine, in respect of each portion or unit to be re-alienated, the matters specified in sub-section (2) of section 79, as if the land comprised in the unit had already become State land:
>
> > Provided that where the original title is a title in perpetuity, the period for which the land is to be re-alienated shall also be in perpetuity, and where the original title is for a period of years, the period for which the land is to be re-alienated shall not be less than the remainder of the period of the lease for which the land was held under the original title.

We observe that the above provision was introduced in 1984 by the National Land Code (Act A587). We are mindful that in the appellant's submission before us, learned counsel for the appellant had informed us that the appellant is not relying on s 204E of the NLC. However, we think that it is necessary for us to consider the development in the statutory provisions on the subject matter of surrender and re-alienation of land upon surrender in the NLC to put things in its proper perspective. With this in mind, we note that the original provisions on procedure on re-alienation after surrender of land under the NLC is governed by s 204. This provision still remains in the NLC and has not been amended. Section 204E was introduced as one of the special provisions that governs the procedure on surrender and re-alienation of land.

[21] Be that as it may, since the decision to approve the appellant's application for surrender and re-alienation was made in 1966, the relevant provision would have been s 204 of the NLC, and in particular, sub-s (4) which reads as follows:

> (4) Land re-alienated on surrender shall be expressed in the document of qualified title to be subject to the like category of land use, and the like express conditions and restrictions in interest, as those (if any) applicable thereto immediately before the surrender; and such land shall, notwithstanding the surrender, continue subject to any implied condition to which it was formerly subject under section 53 or 55, or the Second or Third Schedule, and to any notification under section 54 previously in force with respect thereto.

It is obvious from the above provision that land re-alienated upon surrender shall continue to be subject to the same category of land use, express conditions and restrictions in interest and as well as implied condition attached to the land immediately prior to the surrender. There is nothing in s 204(4) that allows the land administrator to change any of those existing categories of land use, express conditions and restrictions in interest of the re-alienated land. The power to change existing express conditions, category of land use or restriction in interest endorsed on a document of title or to impose new conditions by the respondent or its predecessor is governed by s 124 of the NLC. Even then, it can only be done on application by the registered proprietor of the land. The power is however a discretionary power.

[22] In 1966, there was no judicial pronouncement as to the scope of s 124 or s 204(4) of the NLC or as to the extent of authority or power of the land administrator to impose any change in category of land use, express conditions and restrictions in interest upon approving the application for subdivision and re-alienation under s 203 of the NLC.

[23] In *Sri Lempah* the High Court ruled that 'the Land Ex Co has exceeded its jurisdiction in directing that approval for conversion under section 124 NLC is conditional upon the appellants surrendering their perpetuity title in exchange for 99 year lease.' – p 141 of the report.

[24] The High Court gave two reasons for this ruling. The first reason was stated as follows:

> What is happening here is not strictly 'deprivation' or 'taking' of property since the appellants will be getting their land back but at most a diminution of the title to which they now enjoy. It is arguable whether in the instant case there will in fact be a reduction in the value of the title to the land since in economic terms the difference is whether a piece of land situated at the junction of the Sungai Besi – San Peng and Pudu roads is more valuable as a residential house with a perpetuity title or as a hotel-cum-shop-houses on a 99-year lease. The immediate returns of the latter would certainly be more attractive than the former. It may well be that it was

on these economic assumptions that the land ex co seized the opportunity to implement the policy of the government to convert existing perpetuity titles to periodic leases in the interest of future development of the City of Kuala Lumpur. It is true that the respondent has not stated precisely that this is the position but it is a reasonable inference to be drawn from the fact which is of public knowledge that for some years now the government has practically ceased alienating new land in perpetuity but favoured instead the issue of leases not exceeding 99 years, particularly in respect of town lands.

If that be the case, I am of the view that such a radical change in land administration should be effected by legislation. If that is done then the public is fore-warned and the purchase price of lands held under perpetuity titles by intending developers would be regulated by the probability that the developers may have to exchange their newly acquired perpetuity titles with leases of 99 years or less.

[25] The second reason is with respect to the exercise of the discretion by the land executive committee to impose or change conditions in approving the application for conversion under s 124(4) of the NLC. On this point, the High Court states as follows:

I do not think that these provisions confer an absolute discretion on the land ex co to approve or reject applications as it pleases. It may only approve applications which comply with the provisions of that section. Of course it has the power to reject applications but in exercising this power it must act in accordance with natural justice, equity and good conscience. It may be called upon to give reasons for its decisions. This is clearly contemplated by the National Land Code in providing for appeals to the High Court from the decision of the land executive committee: s 418 of the NLC'.

[26] The above decision of the High Court in *Sri Lempah* was affirmed by a strong coram of the Federal Court on appeal by the *Pengarah Tanah dan Galian* Wilayah Persekutuan. All the three learned judges in the Federal Court namely, Suffian LP, Raja Azlan Shah Ag CJ (as His Royal Highness then was) and Chang Ming Tatt FCJ were unanimous in their finding that the state authority would be acting outside the powers conferred on it if it proceeded to impose a condition that the applicant accept only a lease in exchange for his title in perpetuity. All the three learned judges were also unanimous that the land executive committee in imposing a condition upon approving the application for conversion must act reasonably and may only impose conditions relevant to the permitted development. Suffian LP said at p 145 of the report as follows:

The Committee contended that the words 'compliance with such other requirements as the State Authority may think fit' which I have italicized in paragraph (c) of the subsection (5) of section 124 allowed it to make the applicant here accept only a lease in exchange for his title in perpetuity. With respect I do not agree. If the Committee is right, it would mean that it can unreasonably impose a condition that is irrelevant to the permitted development, such as, to take an absurd example, that the applicant should wear a beard for the rest of his life or that he

A should fly once round the moon. In my judgment, the Committee must act reasonably and may only impose conditions relevant to the permitted development and does not have the drastic right to make the applicant give up title in perpetuity and receive in place of it only a 99-year lease.

...

B Be it noted that title to be issued for the part to be retained must be in continuation of title to the land as a whole. If title to the whole land is one in perpetuity, then it follows that title to the part retained must also under this section 202 be one in perpetuity. In my judgment, this section is the clearest authority for the proposition advanced by the developer here, that the Committee cannot do what it claims it has C power to do.

[27] The learned Raja Azlan Shah Ag CJ also rejected the contention by the chairman of the land executive committee in that case that the land executive committee has unfettered discretion to grant or reject any application under D s 124 or impose such conditions or other requirements as the committee think fit. Having discussed the various authorities on the exercise of discretion, the learned judge concludes as follows (at p 148 of the report):

E For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than ultra vires. It had exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly F only when acting reasonably. In such circumstances I would follow the dictum of Hodson L.J. in *Pyx Granite* (ante, page 579), to the effect that, if a condition is held to be ultra vires, it nullified the whole planning permission. For it must be assumed that without the impugned condition the permission would never have been granted.

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[28] We are mindful that the learned senior federal counsel submitted that *Sri Lempah* is not applicable because it has no retrospective effect. We are also mindful that the senior federal counsel had tried to distinguish the facts in *Sri Lempah* from the facts in the present appeal. However, on this last point, we H observe that except for the 'so-called' consent by the appellant in the present appeal to the change of tenure from perpetuity to leasehold, the material facts in *Sri Lempah* are on all fours with the facts in this appeal. In *Sri Lempah* the express condition on the title was, inter alia, that the land was to be used for the erection of a building. The applicant therein wanted to convert the land use I from building to a hotel. So, they applied for a change in the express conditions as to the category of land use and for conversion from building to hotel. At the same time, they were also willing to surrender portions of the land for purposes of roads and other public utilities and services.

[29] Similarly, in the present appeal the original title had an express condition that the category of land use was building. The appellant in the present appeal wanted to use part of the land as a petrol station and to lease it to ExxonMobil. Hence, the application for subdivision to the respondent.

[30] Therefore, we do not think there is any material difference in the factual matrix of the two cases ie *Sri Lempah* and this appeal save for the 'so-called' consent by the appellant to the change of tenure from freehold to leasehold. In this regard, we observe that in the respondent's letter of 1 July 1966 informing the appellant of the approval of a subdivision, the respondent's letter only mentioned about the 30 year lease in respect of Lot B. The letter is silent as to the tenure of Lot A which was only known to the appellant to be a 99 year lease instead of a title in perpetuity when the title in continuation was issued and registered in the name of the appellant on 24 October 2005. In this respect we recall the passage by the learned Suffian LJ in *Sri Lempah* which was cited above, which said that the title to be issued for the part to be retained must be in continuation of title to the land as a whole therefore if title to the whole land is one in perpetuity, then it follows that title to the part retained must also be one in perpetuity.

[31] Secondly, as to the argument by the learned senior federal counsel that the decision of *Sri Lempah* is not applicable because it has no retrospective effect, we are not convinced. Firstly, we are of the view that the High Court and the Federal Court in *Sri Lempah* were interpreting the scope of authority and the extent of the power of the state government to have a policy where a land owner must give up his title in perpertuity in exchange for a leasehold in order to have his application for conversion or subdivision approved; as well as the power and authority of the land executive committee being the administrative arm of the government to impose such condition in carrying out of the state government policy. In our view, the pronouncement of the law on this issue by the High Court and the Federal Court in *Sri Lempah* is a pronouncement of the general principle of law applicable when the same or similar provision in law that confers power on the authority is in issue.

[32] In *Sri Lempah* the courts (ie the High Court and the Federal Court) were dealing with the exercise of discretion by the land executive committee under s 124 of the NLC to approve any application by a proprietor of any alienated land for change in the category of land use, express conditions and restrictions in interest endorsed on the title. Under s 124(2) and (4) of the NLC, the state authority may, in approving any application under s 124(1) (change in the category of land use, express conditions and restrictions in interest endorsed on the title), impose any new condition which it deems fit; but which condition must be reasonable for the purpose of the development of

A the land as decided by *Sri Lempah*. In our view similar considerations apply in the present appeal.

[33] We accept learned counsel for the appellant's submission that there is nothing in *Sri Lempah* that says the decision is applicable only prospectively and does not have retrospective effect. This issue was discussed by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457. Though that case is a criminal case the principle of retroactivity discussed and applied therein is relevant to the present appeal. In *Mohd Radzi bin Abu Bakar* the appellant was convicted for trafficking in dangerous drugs. At the High Court trial the learned judge had raised double presumptions against the appellant – firstly the presumption under s 37(d) for possession and the second presumption was under s 37(da) for trafficking. At the time of the conviction by the High Court, the Federal Court had yet to pronounce its decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 which ruled against double presumptions. However when *Mohd Radzi bin Abu Bakar*'s appeal was heard by the Court of Appeal, *Muhammed Hassan* was already decided. The majority of the Court of Appeal applied *Muhammed Hassan* and allowed the appeal and set aside the conviction and sentence against the offence of trafficking; and substituted it with a conviction and sentence for possession. The majority of the Court of Appeal held, that on the authority of *Muhammed Hassan*, the High Court had misdirected itself. On this principle of retroactivity the late Abdul Malek Ahmad FCJ in *Mohd Radzi* said that 'the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does apply to cases already disposed of at that highest appellate level'. In coming to this conclusion the learned judge had referred to two cases. The first case is *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298; [2002] 3 CLJ 521 where the Court of Appeal had also referred to *Muhammed Hassan* and said that 'the Federal Court could, therefore, if it had so wished, have declared its decision in *Muhammed bin Hassan* to be of prospective effect only. But that is not what happened. The decision in *Muhammed bin Hassan* consequently falls under the general doctrine of retrospectivity and therefore applies to the present case. We therefore are bound to apply it'. The second case is that of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311. In commenting on *Dato' Yap Peng* a Supreme Court decision, the learned Abdul Malek Ahmad FCJ said that 'the principle enunciated in *Public Prosecutor v Dato' Yap Peng* seems to indicate that, unless there is a prospective ruling, any decision will also affect all cases disposed of before that decision'. Therefore, in our view, in the light of the above discussion, the argument by the learned senior federal counsel that *Sri Lempah*'s decision has no retrospective effect cannot stand. Instead, we are of the opinion that in the absence of an express prospective ruling by the Supreme Court in *Sri Lempah*, the learned High Court judge in this appeal should have applied the principle in *Sri*

Lempah and held that the decision by the respondent to replace the perpetuity holding to a leasehold holding is ultra vires and unlawful. Based on the same argument, we hold that the respondent or more particularly its predecessor do not have the power to ask or to direct or to impose on the appellant to surrender land held in perpetuity in exchange for a 99 year or 30 year lease as a condition for approval of an application for subdivision by the appellant.

[34] Thirdly, with regard to the learned senior federal counsel's argument that the appellant in this appeal had indicated their consent to the terms imposed by the respondent in approving the appellant's application for subdivision, thereby distinguishing the facts in this appeal from the facts in *Sri Lempah* where the applicant had not consented to the change from title in perpetuity to leasehold, we are of the view that there is no merit in this argument. The learned Suffian LP had said at p 145 of the report that in an application for change of conditions of land use etc under s 124(1) of the NLC, the question of consent does not arise as consent is implicit in the application. Moreover, we agree with the submission by learned counsel for the appellant that on the authority of *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which states that:

> no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction', ...

the issue of consent or acquiescence is irrelevant.

[35] Next, we will deal with the issue of limitation. The learned senior federal counsel had argued that the appellant's application was clearly out of time. The application was made 45 years after the decision was communicated to the appellant. Firstly, it was contended that the appellant was time barred under s 9 of the Limitation Act 1953 (Act 254) which provides that no action shall be brought to recover any land after the expiration of 12 years from the date on which the right of action accrued. It was argued that in this case, it was never disputed that the decision was made in 1966. Therefore, any action taken to challenge that decision after 20 January 1978 is statute barred. Secondly, it was contended that the appellant's action was directed at a public authority namely the respondent. It was argued that under s 2 of the Public Authority Protection Act 1948, an action against the public authority must be commenced within 36 months of the act complained of or in the case of a continuance of injury or damage within 36 months of the date the injury or damage ceases. In this case, it was argued that the originating summons filed by the appellant in 2011 to challenge the decision of the land administrator made in 1966 is well outside the 36 months limitation period. To support her argument, the learned senior federal counsel referred to the decision of the Federal Court in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ

1; [2009] 1 CLJ 663, where the following passages were found:

> [23] Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring remedy but not the right to sue. That is not correct. In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is 'just as much a 'right' as any other statutory or contractual protection against a future suit'.
>
> [24] In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised. In *Alias Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724; [1997] 4 CLJ 669 the Court of Appeal held that the court has no discretion to set aside a defence of limitation. It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show the plaintiff's cause of action was statute-barred and must fail for that reason.

[36] However, we observe that in all the authorities cited by the senior federal counsel to support her argument on the issue of limitation there was no question of the decision being challenged on the ground that it was ultra vires or unlawful. In all the authorities cited, the challenge was on the merit or the propriety of the decision, not the legality of it. But, in the present appeal the issue is whether the law of limitation is applicable where the decision being challenged is illegal or ultra vires as we have, in this case, found to be so.

[37] In *Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department & Anor* [1996] 5 MLJ 366, the High Court in Kota Kinabalu held that s 2(a) of the Public Authorities Protection Act 1948 is not applicable where issues of nullity are raised. In that case the applicant had filed a notice of motion for, inter alia, an order for an extension of time for the filing of its application for leave to apply for certiorari to quash the direction dated 30 November 1987 issued by the first respondent, Director General of Inland Revenue. The notice of motion by the applicant was dated 17 March 1995. It was argued for the Director General of Inland Revenue that the application was time barred because it was filed approximately seven years from the alleged reports complained of. However, the High Court rejected the argument because the High Court found that, at the time of issuing the direction, the Director General of Inland Revenue ie the first respondent had no evidence of new facts that justified a departure from the original notices of assessment. And therefore the direction issued to the applicant and the subsequent notices of assessment were found to be void.

[38] Similarly in the case of *Hubah Sdn Bhd & Ors v Koperasi Pusaka (Penampang) Berhad & Ors* [2011] MLJU 230; [2011] 1 LNS 274, another High Court in Kota Kinabalu, Sabah had also ruled that the law on limitation does not apply to a void contract. In that case the High Court found that the

relevant agreements entered into between the parties to be null and void ab initio for breach of regulations of the *Koperasi* and non-compliance with the Co-Operative Society Act 1993. The learned judge in that case had referred to several authorities on the legal effects of a void contract as well as to the number of Indian authorities on the effect of limitation on void instruments. In particular, the learned judge in that case, had referred to a passage in the Indian case of *Appanna v Jami Venkatappadu & Ors* AIR 1953 Madras 611, at p 612 which reads:

> But different considerations arise when the instrument of transfer is void and does not operate to vest the title in the transferee. In that case, the transferor continues to be the owner of the properties even after the execution of the instrument precisely as before. There is no need in such a case for the transferor to move the Court for setting aside the deed because there is no transfer which the Court has to rescind and if the transferor has to recover possession of the properties covered by the deed, he can ignore the deed and recover on the strength of his own title. ...

Guided by the authorities referred to, the learned judge in that case concluded as follows:

> Thus it is obvious that when someone pleads the application of the Limitation Ordinance as a defence or shield so to speak, he or she is saying that 'yes you have a right but because you did not enforce your right within the prescribed period, your right of enforcement is lost'. In respect of void contracts, as I have said earlier, no right whatsoever is born which means that any plea of limitation is misconceived and misplaced.

(Note: At the time of writing this judgment, *Hubah Sdn Bhd* had been heard and disposed of by the Court of Appeal of which I was one of the member of that Coram. The Court of Appeal's judgment by Ramly Ali JCA (now a judge of the Federal Court) is reported in *Hubah Sdn Bhd & Ors v Koperasi Pusaka (Penampang) Bhd* [2013] 5 MLJ 761. The Court of Appeal reversed the High Court's decision, but on a different point).

[39] In *Ngo Ong Chung & Ors v Pengarah Tanah dan Galian Perak Darul Ridzuan* [2013] 10 MLJ 879; [2013] 1 LNS 146, the High Court in Ipoh had occasion to deal with a similar issue as in the present appeal ie to decide whether the plaintiffs in that case are entitled to a declaration that the changing of the tenure of their lands from freehold to leasehold by the defendant upon the issuance of subdivided titles pursuant to an application for conversion and subdivision of the lands which tenure was originally freehold is null and void and contrary to the provisions of the National Land Code and the Federal Constitution. As in the present appeal, the plaintiff's application was resisted by the defendant on the ground that the plaintiff's application was time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948. The learned High Court judge in that case, having found that the act of reducing the land tenure from freehold to leasehold was ultra vires, held that the protection under s 2(a) of the PAPA 1948 is limited to any act done in pursuance of execution or

intended execution of any written law or of any public duty or authority, and that the neglect or default must be in the execution of any such written law, duty or authority. The learned judge went further to hold that not every act of a public authority is entitled to protection. Referring to the judgment by Lord Atkinson in *Bradford Corpn v Myers* [1916] 1 AC 242, the learned judge held the view that the act of a public authority protected under s 2(a) of the PAPA 1948 was only confined to intra vires acts or acts done within the power of the public authority. In that case, as in the instant appeal, the learned High Court judge relying on the Supreme Court's decision in *Sri Lempah*, held that the defendant's act in reducing the land tenure from freehold to leasehold is an act done without jurisdiction and therefore ultra vires. The defendant therefore cannot seek the protection of s 2(a) of the PAPA 1948. In his judgment the learned High Court judge said that, 'It would also be incongruous and perhaps absurd to suggest that a person who is acting contrary to the law can at the same time be said to be acting in pursuance of any law or public duty'.

[40] It appears from the above authorities that the proposition that limitation does not apply to any act done outside a body's legal power or authority has been well accepted by the courts. In such a case, the court would not give effect to such act and would readily, if asked, set aside the said act. To support this proposition, we refer to the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, where the Federal Court had laid down the law as follows:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception of this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened any written law, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on the ground of illegality or lack of jurisdiction.

[41] In this case, the respondent or its predecessor clearly has no authority or legal power to reduce the tenure of the appellant's land holding from perpetuity to leasehold. Therefore, by resorting to such an act (ie to change the land tenure from freehold to leasehold) as a condition for approval of the appellant's application for subdivision of Lot 152 which was registered to the appellant into two lots – Lots A and B, the respondent or its predecessor had exceeded its legal power. Therefore, the act is null and void.

[42] The learned senior federal counsel also submitted that the appellant's application is time barred under O 53 of the Rules of the High Court 1980

which provides under r 3(6) that the application for judicial review must be made within 40 days from the date when the decision was first communicated to the appellant (under the new O 53 of the Rules of Court 2012, the limitation period is three months). It is the contention of the learned senior federal counsel that the application to challenge the decision of the land administrator in this case, must be made by way of judicial review as the appellant was challenging the decision of a public authority namely the land administrator. However, in *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794, Raus Sharif PCA, speaking for the Court of Appeal, after reviewing the House of Lord's decision in *O'Reilly v Mackman* [1982] 3 All ER 1124, reiterated that the principle that a plaintiff who alleges infringement by a public authority of his rights must do so by way of judicial review as to allow him to proceed by way of an ordinary action would be against public policy and an abuse of process of court, is only a general rule. Therefore, not every case where a challenge is mounted against a decision by a public authority must be by way of judicial review. There are exceptions to this general rule. In this respect, the learned judge in *Litus Jau* had referred to the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, and had followed the guidelines stated in that case in ascertaining the proper mode of proceedings in public law matters. The guide is this:

> If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. ... But if the matter is under private law though concerning a public authority, the mode to commence such action is under O 53 is not suitable ... Much depends on the facts of the case.

[43] In the present case, though the appellant was challenging the decision of the land administrator who is a public authority, the rights that were affected by the decision are the private rights of the appellant, namely, the right to ownership and enjoyment of land. Before the decision, the appellant would able to enjoy tenure of freehold land; however, after the decision, that enjoyment was somehow affected in that the enjoyment is now limited only to the number of years approved by the land administrator. Therefore, the dominant issue in this case is the issue of a private rights. Accordingly, the appellant has the option of either proceeding under O 53 of the Rules of the High Court 1980 (now O 53 of the Rules of Court 2012) or by ordinary action by way of originating summons.

[44] It is also pertinent to note that in their application, the appellant were seeking declaratory orders. Learned counsel for the appellant argued that limitation does not apply to a suit or action or proceeding for declaratory

orders. In this regard, we refer to the Court of Appeal's decision in *Director of Forest, Sarawak & Anor v Balare Jabu & Ors and another appeal* [2012] 7 CLJ 685, where the court speaking through Abdul Wahab Patail JCA said as follows:

> While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders.

We agree with the above view and we hold that there is no merit in this argument by the learned senior federal counsel.

[45] The learned senior federal counsel also argued that the appellant ought to have appealed against the decision of the land administrator under s 418 of the NLC; and had the appellant taken that course, the appellant would have been out of time as under that section the time limit to appeal against the decision of the land administrator is three months from the date the decision was communicated to the appellant. To support her contention, the learned senior federal counsel cited the decision of Federal Court in *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillian Berhad* [1981] 1 MLJ 234, where the court held that the special provision for limiting the time within which to enforce the right indicates the intention of the legislature that the right be exclusive of any other mode of enforcing it. We however, agree with learned counsel for the appellant that such argument is not applicable to the present case because in *Syarikat Harper Gilfillian Berhad*, the issue of the nullity of the decision was never raised. Moreover as we have mentioned earlier, in their application, the appellants were seeking declaratory orders. And as we have pointed out, in *Balare* limitation does not apply to actions or proceedings for declaratory orders. We also refer to the Federal Court's decision in *EU Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37, where it was stated that:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack.
>
> ...
>
> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void'.

[46] Therefore in our view, it is not fatal to the appellant for not resorting to s 418 of the NLC in order to challenge the decision of the land administrator.

[47] Now we would like to address the view expressed by the learned High Court judge that since the appellant had reaped the benefits of being able to lease Lot 2 to ExxonMobile for income for the last 30 years, the appellant's action is not only time barred but also unconscionable. It appears to us that the learned High Court judge is implying that the appellant's application could not succeed because the appellant had reaped the benefits from the decision of the land administrator. We do not think that is the correct view. Such argument is grounded on rules of equity. We think equity does not apply where the decision purportedly giving rise to the equity is unlawful.

[48] Finally, we would like to touch on the issue of laches and acquiescence as equitable defences. First of all, we must state that these defences were not pleaded nor raised by the parties before the High Court or before us. We had, after hearing counsels' submission, adjourned the matter for decision to allow us some time to deliberate on the issues raised. During the adjournment, we decided to request the parties to make further submissions on the issue of laches and acquiescence. We made this request in the light of the provisions of s 32 of the Limitation Act 1953 which expressly preserved the equitable defences of acquiescence and laches. The section reads:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

We were of the view that for completeness both parties should address us on this issue.

[49] The parties complied with our request and had filed further submissions on the issue of acquiescence and laches.

[50] The senior federal counsel in her supplementary written submission states that the appellant is guilty of laches and acquiescence and the court has an equitable jurisdiction to refuse relief on the ground of laches as per s 32 of the Limitation Act 1953. She argued that the appellant had come to court without 'clean hands' and had committed laches or acquiescence without any sufficient and reasonable ground for such conduct. Therefore the appellant should be denied their equitable remedies. The learned senior federal counsel also argued that the respondent had suffered prejudice due to the appellant's undue and inordinate delay in bringing the action against the respondent. She further submitted that at no time within the 45 years interval had the appellant informed the respondent that they do not at all consent to the said terms of leasehold of 99 years and 30 years on the subdivided land. The appellant, she argued had at no time retracted their consent on the condition of the approval for subdivided land. To support her view she had referred to us several authorities, namely, *Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor* [2011] 5 MLJ 309; *M Ratnavale v S Lourdenadin M*

Mahadevan v S Lourdenadin [1988] 2 MLJ 371, *Mallisamy a/l Periasamy & Anor v Pentadbir Tanah Melaka Tengah & Anor* [1998] 5 MLJ 495; and *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182.

[51] The appellant submitted that there is no acquiescence on its part and therefore without acquiescence, laches cannot apply. It was also submitted that laches could only bar equitable relief. However, the appellant's claim in this case is not for equitable relief. Also, laches cannot defeat any act which is null and void ab initio. It was argued that delay alone without acquiescence and change of position on the part of respondent does not amount to laches. It was pointed out to us that, in this case, since the date the respondent changed the tenure of Lot 152 upon subdivision from one of perpetuity to leasehold, no third party's right have arisen or accrued. This is an indisputable fact.

[52] The law on laches is clear, in that there is no laches if there is no acquiescence. In para 1478, Vol 16 *Halsbury's Laws of England*, (4th Ed), it is said that the chief element in laches is acquiescence. In the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, cited to us by learned counsel for the appellant in his written submission, Justice Edgar Joseph Jr said that '... In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant ...'. The same view was expressed by the Supreme Court in *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25.

This case was referred to us by learned counsel for the appellant. In that case the Supreme Court held:

> ... The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time, and in that sense acquiescence is an element in laches.

In this regard, the senior federal counsel argued that since 1966, the former committee members and president of the appellant's association had made no issue of the change of land tenure until the appointment of Ong Tatt Poh as the president of the appellant's association. The senior federal counsel urged the court to take note that the appellant had failed to inform the court as to when the said Ong Tatt Poh had taken the seat of the president of the appellant's association. It was also argued that the appellant had waived its right since the appellant had not taken any step to correct the mistake from the date the decision made by the first respondent in 1966 until the filing of the originating summons. In short, the learned senior federal counsel argued that the appellant had not shown reasonable diligence in prosecuting its claim and therefore any equitable remedy should be refused. The learned senior federal counsel cited the case of *M Ratnavale v S Lourdenadin M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371as authority. As to knowledge, the learned senior federal

counsel argued that the appellant failed to show to the court that he had knowledge of the material facts as to the allegedly void decision by the first respondent. It was submitted that the decision was communicated by the respondent in 1966 and the appellant had full knowledge of the decision.

[53] We are persuaded by the submission on laches and acquiescence by learned counsel for the appellant. We are of the view that laches and acquiescence do not apply to the present case. First of all, we agree with the appellant that the remedy they are seeking for is not an equitable remedy as found in those cases cited to us by the senior federal counsel for the respondent. In those cases the applicant or the plaintiff was seeking an equitable remedy namely specific performance. Secondly, we do not accept the argument that because the decision of the first respondent predecessor was communicated to the appellant in 1966, the appellant ought therefore to have full knowledge of the decision and its legal implication. To our mind, having knowledge of a decision and having understood its legal implication particularly as to the validity or legality of the decision are two different things. The appellant had in its affidavit in para 7 of the affidavit in support of the application expressly averred on oath that its past committee members had no knowledge that the respondent's act was ultra vires the provisions of the NLC. Thirdly, the respondent had not shown in the affidavit in opposition to the appellant's application as to how the respondent is prejudiced by the appellant's application. We observe that since the communication of the decision to the appellant and until the filing of the appellant's application, there is no transfer of the ownership of the land in question to any third party. Therefore, no third party interest is affected by the application.

[54] With regard to the argument by the respondent that, relying on the case of *Mallisamy a/l Periasamy & Anor v Pentadbir Tanah Melaka Tengah & Anor* [1998] 5 MLJ 495, the respondent is functus officio. We agree with the appellant's submission that the case is distinguishable. In *Mallisamy* it is a case where the challenge was with regard to the issue of compensation in a land acquisition under the Land Acquisition Act 1960. Therefore in that case it is correct to argue that once the collector has determined the amount of compensation to be awarded, the collector is functus officio; and the only way to challenge his decision is to refer the matter to the High Court by way of land reference. That is to say that in exercising its discretion to award the amount of damages, the collector is acting in a judicial capacity. In the present case however, the respondent did not carry out its duty in a judicial or quasi-judicial capacity when he changed the tenure of the land from freehold to that of leasehold.

[55] For the above reasons, we will allow the appeal by the appellant and grant the declarations sought in prayer 1 of the originating summons. We also

award cost of RM10,000 to the appellant and ordered the deposit be refunded. However, we are not in a position to order the respondent to reinstate the land tenure to freehold as this is a matter within the discretion of the respondent. The appellant can however apply to the respondent for rectification of the land titles with regard to the tenure of the land holding and the respondent is to have regard to the decision of this court in this case when considering such application.

Order accordingly.

Reported by Ashok Kumar